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NO. 297

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

DIXILYN DRILLING CORPORATION, *Petitioner*

v.

CRESCENT TOWING & SALVAGE COMPANY, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

While it is felt that the points raised in the Respondent's Brief have been substantially covered in the initial Brief for Petitioner, it is felt that a few brief comments might be of some assistance to the Court. For the Court's convenience these will be covered in this reply in the order in which they are presented in Respondent's Brief.

I.

With respect to that part of Crescent's brief entitled "The Interpretation of the Contract",[1] four observations may be of some help to the Court:

1.

Crescent would have this Court ignore the question relating to the definitiveness of the contract on the theory that the interpretation of the contract is a fact finding and this Court should not concern itself with any fact findings. Crescent impliedly argues that the Court of Appeals below held that the contract was clear and unequivocal and that this was a finding of fact which this Court cannot examine. This, of course, is patently erroneous for the Court below specifically held that the contractual language was doubtful or ambiguous[2] and then proceeded to examine in detail the parol evidence in an attempt to determine the intention of the parties. Even the Court of Appeals recognized that the language in this contract was not as specific as required by the earlier decisions of this Court, and by the earlier decisions of the Court below, and thus proceeded to a consideration of parol evidence as to the intention of the parties. The question here is not: Did the Court of Appeals below correctly determine what the intention of the parties was from the parol evidence? But rather: Must the contract express the intention to indemnify against Crescent's negligence or the unseaworthiness of its vessels in the plainest of language or will the Court look to parol evidence in an attempt to ascertain the intention of the parties when the language of the contract is doubtful or ambiguous? Heretofore

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[1] Respondent's Brief, pages 9 through 15.

[2] R. 163.

when the language of an alleged indemnity contract was doubtful or ambiguous as the Court of Appeals below found to be the case here, the law had stepped in and said as a matter of law that the contractual language was not sufficient to require Dixilyn to indemnify Crescent for the consequences of its own negligence.[3] Thus the question here is:

> Does an indemnity agreement have to be specific to pass on to another party liability for the other's negligence or is doubtful or ambiguous language enough? This is not a fact question but one of law only.

2.

It is interesting to note that it was not until Crescent reached the Court of Appeals below that it ever contended that the contract was clear and unambiguous and could stand on its own feet, for upon the trial in the District Court below it was Crescent who insisted upon the introduction of parol evidence relating to the intention of the parties over the repeated objections of counsel for Dixilyn.[4] It was Crescent itself that insisted upon the record being burdened with parol evidence relating to the intention of the parties, not Dixilyn, thus, in fact, taking a position before the District Court below which is exactly the opposite from the position that it now takes. This is but one factor that indicates that even Crescent recognized at one time as have both Dixilyn and the Court of Appeals below that the language of this contract is not as definite as the law requires. If the language of the

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[3] See full discussion in Petitioner's Brief, pages 22 through 34.

[4] R. 42, 59. While not shown in the transcript printed in this Court, this objection was made a third time as shown by the record in the Court of Appeals below at page 354

contract was as clear and specific as Crescent now claims, why did Crescent insist on the parol evidence in an attempt to determine the intention of the parties.

3.

Crescent contends that not only the language in the contract but the intent of the parties was clear and unequivocal, and that there is no conflict in the testimony as to the intentions of the parties.[5] This is not correct as the record clearly shows:

(1) As Crescent acknowledges, Dixilyn flatly refused to accept a Tower's Release Clause in the contract which said that Crescent would be indemnified for certain damages from "any cause whatsoever, including loss or damages caused by negligence of the Master, Pilot and crew of the towing craft and our employees, agents and representatives."[6] This was Crescent's initial proposal as to the language to be used in the contract with a specific reference to Crescent's negligence, and it is undisputed that this was flatly and completely rejected by Dixilyn.[7] Yet Crescent contends that Dixilyn's acceptance of later language without negligence being mentioned was tantamount to agreeing to assume precisely the same liabilities for negligence which it had flatly and completely rejected in the initial submission by Crescent. What stronger evidence can be found that Dixilyn did not intend to indemnify Crescent for its own negligence than this rejection of that precise term

[5] Respondent's Brief, page 10.
[6] R. 23.
[7] R. 92; Respondent's Brief, page 5.

in the proposed clause for the contract which Crescent itself had drafted?

(2) Dixilyn's Mr. Tidwell, who was the man who primarily dealt with Crescent on the contract, testified categorically that Dixilyn never intended to protect Crescent from the results of Crescent's negligence and never intended for Dixilyn's insurance to cover Crescent's negligence.[8] Thus not only is the language of the contract doubtful and ambiguous but the intention of the parties is in direct and irreconcilable conflict. This, of course, becomes important only if it is determined that the previous decisions of this Court requiring an indemnity agreement to be spelled out in the plainest of language are to be overruled and the new and novel rule of law announced by the Court of Appeals below in this case inserted into our jurisprudence.

4.

Crescent's last argument in this section of its brief urges this Court to adopt or affirm the decision of the Court of Appeals below because this is the "modern rather than the old jurisprudence."[9] If it is modern jurisprudence to invite parties to a contract to leave to vague, doubtful and ambiguous language the question of whether or not one party is going to indemnify the other for the other's own negligence or the unseaworthiness of its vessels, then

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[8] Mr. Tidwell testified:

"Q. Was it ever your intent to agree to protect Crescent from the result of Crescent's negligence?

A. No, sir, it was not.

A. Was it ever your intention to have Dixilyn's insurance cover Crescent's negligent acts?

A. No, sir." R. 114.

[9] Respondent's Brief, page 13

we must confess that we are strong adherents to the old jurisprudence. What Crescent asks this Court to do is to encourage parties to all contracts to make them ambiguous and then bring their cases to the Courts for determination when, in fact, controversies such as this not only could but clearly should be absolutely and completely eliminated by the parties to a contract simply by complying with what has been the rule in this Court and in the Court of Appeals below and in at least five of the other Circuits for many years—to pass on these extraordinary liabilities, it must be plainly stated in the contract itself.[10] The decision of the Court of Appeals below leads to nothing but endless litigation with parol evidence almost universally in conflict on the intent of the parties, so the Courts must determine which party is being truthful about the intent of the parties. All of this conflict and uncertainty is easy to eliminate in the contract itself, and this Court can insure that such is the result in all future cases by applying its well settled rule that contracts of indemnity are strictly construed and must spell out the agreement to indemnify for another party's negligence in the plainest of language.[11]

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[10] See full discussion in Petitioner's Brief, pages 22 through 24.

[11] This simple sentence would have accomplished this purpose in this case if it were permitted by the **Bisso** rule, and would have avoided the litigation which has resulted thus far:

> "Dixilyn agrees to indemnify and hold Crescent harmless from any and all damages or claims arising out of the towage operation, including those caused whether in whole or in part by the unseaworthiness of any of Crescent's vessels, and/or by the negligence of Crescent, whether simple, willful or wanton, and/or by the negligence, whether simple, willful or wanton, of third parties or Dixilyn and/or by the unseaworthiness of the vessels of third parties or Dixilyn and/or by any combination of such causes."

II.

As to Respondent's Brief relating to the validity of the contract clause under the *Bisso* rule,[12] these comments may be helpful:

1.

Crescent once again devotes a substantial portion of its brief to the contention that "a shifting of liability from Crescent to Dixilyn was in consideration of lower rates for the towage."[13] This statement is absolutely unsupported in the record and is, in fact, directly contrary to all of the record evidence in this case. Crsecent's own Vice President Apgar as well as Crescent's Vice President Smith both testified categorically and unequivocally that no such choice of rates was ever offered or even discussed with Dixilyn personnel.[14] The only thing in the record that

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[12] Respondent's Brief, pages 16 through 30.

[13] Respondent's Brief, page 19.

[14] Mr. Apgar's testimony on this point was as follows:

"Q. Now then, Mr. Apgar, you never had any conversations at all with Dixilyn's people with respect to the rates that were to be charged in connection with this movement, did you?

A. No, because the only rate we could give them definitely was the rate on the ORLEANS, and we didn't know just what tugs we would be able to get at the time for this movement. We had hoped, of course, we would get the OUACHITA and TOLTEC, but at the time of the meetings we did not know definitely we would be able to get those vessels.

Q. And they left the question of the rates and the amount of money to be paid for the tows to be used in this operation entirely in your hands, did they not?

A. We told them that we would do the very best we could do on that, yes.

Q. They left it entirely in your hands, didn't they?

A. Yes, they never questioned that phase of it

refers to lower rates prevailing is in the letter of Crescent to Dixilyn of December 19, 1957, and it says that in consideration of the Tower's Release Clause attached to that letter being a part of the contract, lower rates will prevail.[15] But this Tower's Release Clause for which the lower rates allegedly would have prevailed was completely and absolutely rejected by Dixilyn, so that in truth and in fact any suggestion by Crescent that they would do it at lower rates if Dixilyn would accept the Tower's Release Clause attached to that letter of December 19, 1957, was completely and categorically rejected and that it was so rejected is clearly confirmed by Crescent Vice President Apgar's own testimony.[16]

Q. Never questioned it. In fact, they had no knowledge until they got your invoice as to how much this movement was going to cost them?

A. Yes, we assured them whatever—we would make sure these charges were reasonable.

Q. I'm talking about dollars and cents. They had no idea what it would cost in dollars and cents to make the movement?

A. I don't know whether they did or not. We didn't give them any idea that I recall." (R. 96)

. . .

Q. There was never any quotation or any indication given to Dixilyn of any kind that it would cost them so much to move this rig if they bore the brunt of the insurance and it would cost them so much more if you bore it?

A. That question never arose." (R. 98)

Mr. Apgar's testimony that no choice of rates was given Dixilyn was confirmed by another Vice President of Crescent, William S. Smith, Jr., who testified:

"Q. (By Crescent's counsel): No rates actually quoted as firm rates for this movement?

A. No, Sir." (R. 63).

[15] R. 22, 23.

[16] R. 92.

It is interesting to note that Crescent in its brief in this Court as well as in its brief in the Court of Appeals below does not refer the Court to a single record reference in support of its contention that a choice of rates was offered. This because it cannot do so, as the record is absolutely and completely void of any such evidence. Crescent's contention that a choice of rates was given to Dixilyn during the contract negotiations in this case is but a figment of someone's imagination and has absolutely no basis in fact or in the record.

2.

Crescent also attempts to create the impression in this portion of its brief that it would not have undertaken this towage if Dixilyn had not agreed to indemnify it or to do the same thing by giving Crescent the benefit of Dixilyn's insurance, and that in the absence of such an agreement by Dixilyn, Crescent would not have undertaken the towage. The inaccuracy of these inferences and conclusions is graphically pointed up by Crescent's letter of November 18, 1957, addressed to Dixilyn Drilling Corporation in which Crescent openly solicited the towage of this rig from Vicksburg, Mississippi to the Gulf of Mexico and represented to Dixilyn not only that it was extremely competent to handle the rig, but that all of its tugs "are fully insured both as to hull and P. & I., which we believe is a full guarantee of maintenance and efficiency.[17] Notwithstanding its open solicitation and representation to Dixilyn that it had all of the insurance coverage on its tugs that it needed, Crescent now insists that it never would have undertaken the towage of this rig

[17] R. 68, 69.

in the absence of Dixilyn's agreeing to indemnify it. This we submit is simply not a reasonable inference to be drawn from the evidence, particularly since Crescent actively pursued this towage contract after Dixilyn had flatly rejected the clause that would have clearly and unequivocally made Dixilyn indemnify Crescent for the consequences of Crescent's own negligence.

3.

Crescent also urges that there is no question of economic duress in this case because it has shown that there were a number of other companies engaged in the towage of offshore rigs. While the record does, in fact, reflect that there are a number of towage concerns who tow offshore rigs, Crescent's evidence falls far short of meeting its burden of establishing that there was no economic duress in this case for it did not offer any evidence that Dixilyn could have obtained this towage from any tug company under any contractual terms that did not include an indemnity agreement that was contrary to *Bisso*. To establish the lack of any economic coercion such as to cause this Court to give any consideration to overruling its decision in *Bisso*, it was incumbent upon Crescent to demonstrate not only that there were other tug companies that did this type of towage, but that there were other tug companies that would afford to Dixilyn the opportunity to have its rig moved with the tug company assuming all liability for the tug's own negligence or unseaworthiness. The record is entirely void of any evidence to this effect notwithstanding the fact that Crescent offered the testimony of two of its own vice presidents who purported to be completely familiar with the towage industry and contracts incidental thereto. In the absence of a showing

that Dixilyn could have obtained this towage with the tugs bearing the risks of their own negligence and unseaworthiness, Crescent has completely failed to establish the absence of any economic duress such as to justify a reversal of *Bisso* or an exception to its public policy rule.

4.

It is a little shocking to read in Crescent's Brief that Crescent in effect doubts that any additional tugs would have done much good in controlling the drilling barge.[18] Crescent takes this position as it tries to argue that this was such a hazardous undertaking that it justifies an exception to the *Bisso* rule. We say that it is shocking to see Crescent take this position in this case for in the Court of Appeals below Crescent took the position that the trial court's finding that insufficient power was furnished by Crescent to control the rig was clearly erroneous and in doing so relied on the testimony of its own Captain that the power was absolutely sufficient for all purposes. Now in its anxiety as it attempts to get this Court to create an exception to *Bisso*, Crescent acknowledges that it never complied with the very essence of its towage contract—that of supplying sufficient power to control the rig at all times—yet it represented to Dixilyn at all times that it could and would supply such power.

5.

It is also somewhat surprising to see Crescent urge upon this Court the establishment of a rule of law that would give towers the same protections from liability in a situation such as this as have been given to other maritime carriers

[18] Respondent's Brief, page 25

only by acts of Congress. In so doing, Crescent, of course, suggests the obvious answer to what it considers to be the injustices of the *Bisso* rule. The answer is not for the Court to change the public policy rule of *Bisso* by a court decision, but for this public policy rule to be changed by the legislative body elected by the people for that purpose—the Congress of the United States. That Congress in the exercise of its legislative powers has seen fit to give certain exemptions from and limitations of liabilities to some maritime carriers is, of course, no reason for this Court to conclude that Congress intended for all maritime carriers to have the benefits of similar exemptions or limitations of liability through court decisions. If the public policy rule of *Bisso* is to be changed, it is respectfully submitted that a carefully considered and planned statutory scheme such as those referred to in Crescent's brief should be enacted for this purpose and that it should not be done through judicial legislation.

Conclusion

It is respectfully submitted that the judgment of the Court of Appeals below must be reversed and this matter remanded to that Court to dispose of Crescent's contentions that the Trial Court's findings of sole fault on Crescent were clearly erroneous.

Respectfully submitted,

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Certificate of Service

I certify that copies of the foregoing Reply Brief for Petitioner have been served on the attorneys for the Respondent, Mr. Charles Kohlmeyer, Jr., Lemle & Kelleher, 1836 National Bank of Commerce Building, New Orleans, Louisiana, and on Messrs. Brunini, Everett, Grantham & Quin, First National Bank Building, Vicksburg, Mississippi by depositing the same in the United States Post Off with First Class Air Mail postage prepaid to the addresses shown above on this the_____day of March, 1963.

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Of Royston, Rayzor & Cook